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No. 02-361

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Sections 1712 and 1721(b) of the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, provide that a library that is otherwise eligible for special federal assistance for Internet access and related services in the form of discount rates for educational purposes under the Telecommunications Act of 1996, 47 U.S.C. 254(h), or grants under the Library Services and Technology Act, 20 U.S.C. 9121 *et seq.*, may not receive that assistance unless the library has a policy that includes the operation of a "technology protection measure" on Internet-connected computers that protects against access by all persons to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 47 U.S.C. 254(h)(6)(B)-(C); 20 U.S.C. 9134(f)(1).

The question presented is whether Sections 1712 and 1721(b) of CIPA induce public libraries to violate the First Amendment, thereby exceeding Congress's power under the Spending Clause.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are set forth in the jurisdictional statement.

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OPINION BELOW

The opinion of the district court (J.S. App. 1a-191a) is reported at 201 F. Supp. 2d 401.

JURISDICTION

The judgment of the district court was entered on May 31, 2002. A notice of appeal (J.S. App. 209a-211a) was filed on June 20, 2002. The jurisdiction of this Court rests on Section 1741(b) of the Children's Internet Protection Act, Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-352, and 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 8 of the United States Constitution provides that "[t]he Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts

and provide for the common Defence and general Welfare of the United States." The First Amendment of the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." The pertinent provisions of the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335, the Telecommunications Act of 1996, 47 U.S.C. 254(h), and the Library Services and Technology Act, 20 U.S.C. 9121, 9122, 9133, 9134, and 9141, are reproduced in an appendix to the jurisdictional statement. J.S. App. 192a-208a.

STATEMENT

1. a. Congress provides federal assistance to public libraries for Internet access pursuant to two statutory programs. Under the Telecommunications Act of 1996, qualifying libraries, including public libraries, elementary school libraries, and secondary school libraries, are entitled to purchase Internet access and related services for educational purposes from telecommunications providers at discounted rates (E-rates). 47 U.S.C. 254(h)(1)(B). Discounts under the E-Rate program reduce the cost of Internet access and related services by 20% to 90%, depending on the extent of economic disadvantage in a particular location. See 47 C.F.R. 54.505. For the year ending June 30, 2002, libraries received $58.5 million in E-rate discounts. Jt. Trial Stip. para. 128. The E-rate program is administered by the Universal Service Administrative Company under the supervision of the Federal Communications Commission. 47 C.F.R. 54.701, 54.702.

Public libraries also receive federal assistance under the Library Services and Technology Act (LSTA), 20 U.S.C. 9121 *et seq.*, which was enacted, *inter alia*, "to stimulate excellence and promote access to learning and information resources" in libraries. 20 U.S.C. 9121(1). Pursuant to LSTA, the Institute of Museum and Library Services makes

grants to state library administrative agencies that have approved plans. See 20 U.S.C. 9133, 9134, 9141. Those grants may be used for, *inter alia*, "electronically linking libraries with educational, social, or information services," "assisting libraries in accessing information through electronic networks," and "paying costs for libraries to acquire or share computer systems and telecommunications technologies." 20 U.S.C. 9141(a)(1)(B) and (E). In fiscal year 2002, Congress appropriated more than $149 million in LSTA grants for state library agencies. Jt. Trial Stip. para. 185.

b. Aided by the E-rate and LSTA programs, libraries have increasingly provided their patrons with access to information from the Internet. By 2000, 95% of the nation's libraries had connected to the Internet. J.S. App. 36a. By connecting to the Internet, public libraries can provide their patrons with a vast amount of valuable information. But there is also an enormous amount of pornography on the Internet, much of which can be obtained for free using any search engine. *Id.* at 30a-31a. Some pornographic Web sites use innocuous names, such as www.whitehouse.com, increasing the likelihood that the site will be reached accidentally. *Id.* at 31a. Many other pornographic sites attach pop-up windows that make it difficult to escape the site. *Ibid.*

The availability of pornography on the Internet has created a serious problem for libraries. Libraries have found that patrons of all ages, including minors, regularly search for online pornography. J.S. App. 2a. Some patrons leave pornographic images on an Internet terminal so that the next user is immediately exposed to them. *Id.* at 38a. Others leave printed pornographic images at the library printer. *Ibid.* Still others engage in inappropriate conduct. *Id.* at 146a.

To address the problems associated with online pornography, many public libraries have installed filtering soft-

ware that blocks access to pornographic sites. J.S. App. 45a. Almost 17% of public libraries use filtering software on at least some of their Internet-connected computers, and 7% have filters on all of their computers. Library Research Center, Univ. of Ill. Grad. Sch. of Lib. & Info. Sci., *Survey of Internet Access Management in Public Libraries* (June 2000) (PX 38); J.S. App. 3a. A library that uses filtering software can set it to block categories of material, such as "Pornography." *Id.* at 50a. When a patron attempts to obtain access to a site falling within such a category, a screen appears that indicates that a block has occurred. *Id.* at 52a. A filter set to block a category such as "Pornography" may sometimes block other sites as well. To minimize that problem, a library can set its filtering software to prevent blocking material that falls into categories such as "Education," "History," "Medical," and "Text/Spoken Only." PX 66C, at 7-8. A library also has the flexibility to add or delete specific sites from a blocking category. J.S. App. 52a. Anyone, including Web site owners, can ask companies that furnish filtering software to unblock particular sites. *Id.* at 53a.

c. The problems associated with the availability of online pornography at public libraries also came to Congress's attention. Congress became concerned that the Internet assistance it was providing to libraries for educational and informational purposes was facilitating access to illegal and harmful pornography. S. Rep. No. 226, 105th Cong., 2d Sess. 5 (1998). The Senate Committee on Commerce, Science, and Transportation held a hearing to examine the problem. *The Children's Internet Protection Act: Hearing on S.97 Before the Senate Comm. on Commerce, Science and Transportation*, 106th Cong., 1st Sess. 1 (1999). During that hearing, the Committee heard testimony that adults "us[e] library computers to access pornography that are then exposed to staff, passersby and children," and that "minors also access[] child and adult pornography in libraries." *Id.* at 49 (prepared

statement of Bruce Taylor). The Committee also heard testimony that improved filtering products could provide a reasonably effective way to prevent access to illegal and harmful pornography. *Id.* at 20-26.

The House Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Commerce Committee also held a hearing on the problems related to online obscenity. *Obscene Material Available Via The Internet: Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Comm. on Commerce*, 106th Cong., 2d Sess. 1 (2000). At that hearing, the Committee received a report that documented more than 2000 incidents of patrons, including both adults and minors, using library computers to view online pornography, including obscenity and child pornography. *Id.* at 27. See J.A. 478-549 (David Burt, *Dangerous Access, 2000 Edition: Uncovering Internet Pornography in America's Libraries* (2000) (GX 8)).

d. To address the problems associated with the availability of online pornography at libraries, Congress enacted the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335. Sections 1712 and 1721(b) of CIPA provide that a library may not receive assistance for Internet access and related services under the E-rate or LSTA program, unless it has "a policy of Internet safety that includes the operation of a technology protection measure that protects against access" by all persons to "visual depictions" that are "obscene" or "child pornography," and that protects against access by minors to "visual depictions" that are "harmful to minors." 20 U.S.C. 9134(f)(1)(A)(i) and (B)(i); 47 U.S.C. 254(h)(6)(B)(i) and (C)(i).[1] A "technology protection measure" is defined as "a

[1] CIPA also applies to schools that receive grants under Title III of the Elementary and Secondary Education Act of 1965, and assistance

specific technology that blocks or filters Internet access to material covered by" CIPA. 47 U.S.C. 254(h)(7)(I).[2]

CIPA permits the library to "disable" the technology protection measure "to enable access for bona fide research or other lawful purposes." 20 U.S.C. 9134(f)(3); 47 U.S.C. 254(h)(6)(D). Under the E-Rate program, disabling is permitted "during use by an adult." 47 U.S.C. 254(h)(6)(D). Under the LSTA program, disabling is permitted during use by any person. 20 U.S.C. 9134(f)(3).

2. A group of libraries, library associations, library patrons, and web site publishers (appellees) filed suit in the United States District Court for the Eastern District of Pennsylvania against the United States and the government agencies and officials responsible for administering the E-rate and LSTA programs, challenging the constitutionality of CIPA's filtering provisions. J.S. App. 5a. Appellees alleged that the provisions of CIPA that apply to public libraries are facially unconstitutional because they induce

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under the E-rate program. 20 U.S.C. 6777; 47 U.S.C. 254(h)(5) (Sections 1711 and 1721(a) of CIPA). Those provisions are not at issue here. Pet. App. 16a.

[2] CIPA adopts the definitions of "obscene" and "child pornography" set forth in the federal criminal code. 20 U.S.C. 9134(f)(7)(D); 47 U.S.C. 254(h)(7)(E) (incorporating 18 U.S.C. 1460's definition of "obscene"); 20 U.S.C. 9134(f)(7)(A); 47 U.S.C. 254(h)(7)(F) (incorporating 18 U.S.C. 2256's definition of "child pornography"). CIPA defines "harmful to minors" as "any picture, image, graphic image file or other visual depiction that—(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) taken as a whole, lacks serious literary, artistic, political or scientific value as to minors." 20 U.S.C. 9134(f)(7)(B); 47 U.S.C. 254(h)(7)(G). CIPA defines a "minor" as an individual under the age of 17. 20 U.S.C. 9134(f)(7)(C); 47 U.S.C. 254(h)(7)(D).

public libraries to violate their patrons' First Amendment rights. *Ibid.* Appellees also alleged that CIPA imposes an unconstitutional condition on the receipt of federal assistance, imposes an impermissible prior restraint on speech, and is unconstitutionally vague. *Id.* at 5a & n.1. Pursuant to Section 1741(a) of CIPA, a three-judge district court was convened. J.S. App. 6a.

After a trial, the district court held that CIPA is facially unconstitutional because it induces public libraries to violate the First Amendment rights of their patrons. J.S. App. 13a. The court accordingly enjoined the government agencies and officials responsible for administering the E-Rate and LSTA programs from withholding federal assistance for Internet access or related services from any public library for failure to comply with CIPA. *Id.* at 191a.

The district court analyzed the constitutionality of CIPA under the framework for Spending Clause legislation set forth in *South Dakota* v. *Dole*, 483 U.S. 203, 207-210 (1987). J.S. App. 95a. Under that decision, Congress may not use its spending power "to induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210. The district court held that CIPA is facially unconstitutional under *Dole*, because, in the court's view, "any public library that complies with CIPA's conditions will necessarily violate the First Amendment." J.S. App. 102a.

The district court acknowledged that "generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational [basis] review." J.S. App. 120a. But the court refused to apply that same constitutional analysis to libraries' content-based decisions regarding material they acquire from the Internet. *Id.* at 121a. "The central difference," the court stated, "is that by providing patrons with even filtered Internet access, the library permits patrons to receive speech on a virtually unlimited number of topics,

from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable." *Ibid.* The court was therefore "satisfied that when the government provides Internet access in a public library," it has created a "designated public forum." *Id.* at 109a.

The district court next held that a public library's content-based restrictions on access to that "forum" trigger strict scrutiny. J.S. App. 128a. Based on its analysis of this Court's public forum and government subsidy decisions, *id.* at 127a-128a, the district court concluded that "where a public library opens a forum to an unlimited number of speakers around the world to speak on an unlimited number of topics, strict scrutiny applies to the library's selective exclusions of particular speech whose content the library disfavors." *Id.* at 128a. The court also concluded that strict scrutiny is applicable based on its understanding that a library's provision of Internet access "promotes First Amendment values in an analogous manner to traditional public fora, such as sidewalks and parks." *Ibid.*

Applying strict scrutiny, the district court held that the government has a compelling interest "in preventing the dissemination of obscenity, child pornography, or, in the case of minors, material that is harmful to minors." J.S. App. 139a. The court also concluded that, in certain circumstances, "a public library might have a compelling interest in protecting library patrons and staff from unwilling exposure to sexually explicit speech that, although not obscene, is patently offensive." *Id.* at 146a. Furthermore, the court found that "[t]he volume of pornography on the Internet is huge," that "library patrons of all ages, many from 11 to 15, have regularly sought to access it in public library settings," *id.* at 2a, and that "software filters provide a relatively cheap and effective, albeit imperfect, means for public libraries to

prevent patrons from accessing speech that falls within the filters' category definitions," *id.* at 90a-91a.

The district court nonetheless held that a public library's use of software filters to prevent access to illegal and harmful material is not narrowly tailored to further the government's interests. J.S. App. 149a. The court found that because of the limits of technology, filters set to prevent access to illegal and harmful pornography also restrict "many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography." *Id.* at 148a-149a.

The district court also concluded that there are less restrictive ways to prevent access to content covered by CIPA. J.S. App. 157a-167a. The court determined that libraries "can adopt Internet use policies that make clear to patrons that the library's Internet terminals may not be used to access illegal content," and they "can detect violations of their Internet use policies either through direct observation or through review of the library's Internet use logs." *Id.* at 158a-159a. The court concluded that a library could adopt similar policies to restrict minors from obtaining material that is harmful to minors. *Id.* at 162a. The court also determined that there are less intrusive methods to prevent patrons from "unwillingly being exposed to patently offensive, sexually explicit content," such as "plac[ing] unfiltered terminals outside of patrons' sight-lines and areas of heavy traffic," and "us[ing] privacy screens or recessed monitors." *Id.* at 164a-166a.

Finally, the district court held that CIPA's provisions permitting the library to disable the filtering software for any lawful purpose do not demonstrate that CIPA is narrowly tailored. J.S. App. 167a-177a. The court concluded that "the requirement that library patrons ask a state actor's permission to access disfavored content violates the First

Amendment." *Id.* at 170a. The court reasoned that patrons would be deterred from asking for permission to obtain access to speech "that is constitutionally protected, yet sensitive in nature." *Id.* at 171a-172a. While the court recognized that libraries may permit anonymous requests to disable the filtering software, it regarded that option as inadequate because such requests cannot be processed "immediately." *Id.* at 174a.[3]

SUMMARY OF ARGUMENT

I. The district court erred in holding that CIPA induces public libraries to violate the First Amendment rights of their patrons. Public libraries have broad discretion to decide what material to add to their collections, and the use of filtering software to block access to online pornography falls well within the permissible limits of that discretion.

A. The traditional mission of public libraries is to facilitate worthwhile and appropriate research, learning, and recreational reading and pursuits. To fulfill that mission, public libraries must have broad discretion to make content-based

[3] In a lengthy footnote (J.S. App. 180a-188a n.36), the district court discussed appellees' alternative contention that CIPA imposes an unconstitutional condition on the receipt of federal assistance. In the course of that discussion, the court expressed the view that appellees' position that public libraries may assert First Amendment rights "may well be correct." *Id.* at 184a n.36. The court also stated that public libraries might also be able to "rely on their patrons' rights, even though their patrons are not the ones who are directly receiving the federal funding." *Ibid.* The court further stated "that [appellees] have a good argument that CIPA's requirement that public libraries' use of filtering software distorts the usual functioning of public libraries in such a way that it constitutes an unconstitutional condition on the receipt of funds." *Id.* at 188a n.36. But the court ultimately did not resolve any of those issues. *Id.* at 179a-180a & 188a n.36. The court also did not address appellees' contentions that CIPA imposes a prior restraint on speech and is unconstitutionally vague. *Id.* at 179a.

judgments in selecting material for their collections. For that reason, neither forum analysis nor strict scrutiny applies to a public library's collection decisions. Those doctrines would threaten to allocate to courts, rather than public libraries, the role of selecting what material should be included in the collections that public libraries make available in their local communities.

This Court has held that forum analysis and strict scrutiny are incompatible with the discretion that public television stations must have to fulfill their journalism missions, *Arkansas Educational Television Commission* v. *Forbes*, 523 U.S. 666, 672-673 (1998), and the discretion that the National Endowment for the Arts must have to fulfill its mission to select worthwhile art, *National Endowment for the Arts* v. *Finley*, 524 U.S. 569. 585-586 (1998). Similarly, those doctrines are incompatible with the discretion that public libraries must have to fulfill their traditional missions. Rather than applying strict scrutiny to a public library's collection decisions, a court should instead apply rational basis review.

B. The deference owed to public library's collection decisions extends to its judgments about what material to collect from the Internet. Libraries collect material from the Internet for the same reasons that they collect books and other resources, and they therefore need the same degree of discretion to make judgments regarding what material to collect. Thus, just as public libraries have broad discretion to exclude pornography from their print collections, they have broad discretion to exclude pornography from their Internet collections.

C. Even if forum analysis were applicable to a public library's Internet collection decisions, strict scrutiny would not apply. If subjected to forum analysis, a public library's Internet-connected computers would most appropriately be viewed as a nonpublic forum. The entity responsible for a

nonpublic forum may make content-based exclusions that are reasonable in light of the purposes of the forum, provided they are viewpoint neutral. Since there is no allegation of viewpoint discrimination here, the question presented by forum analysis would be whether the use of filtering is reasonable in light of the traditional purposes of a public library.

Strict scrutiny also would not apply if a public library's Internet-connected computers were viewed as a designated public forum. The standard for reviewing exclusions from a limited public forum is essentially the same reasonableness standard as the one that applies to exclusions from a nonpublic forum.

D. Regardless of whether the standard for reviewing a public library's collection practices is rationality or reasonableness, a library's use of filtering software to block material covered by CIPA is constitutional. The district court itself found that filtering software is a reasonably effective way to block pornographic material, and that such material falls outside of a public library's traditional collection boundaries.

The district court's finding that filtering software erroneously blocks some constitutionally protected speech does not undermine the reasonableness of their use. Libraries decline to collect many books that are constitutionally protected, and declining to collect constitutionally protected materials from the Internet is equally unproblematic. Public libraries may reasonably conclude that it best furthers their missions to use a resource that is effective in keeping out pornography, even if that resource keeps out some material that is not pornographic.

Moreover, patrons will only infrequently be unable to find the information they need because a particular Web site has been blocked. Only a very small percentage of all sites on the Web are erroneously blocked; information that is erroneously blocked can often be found on other sites or in the

library's print collection; patrons may always ask the library to unblock the site or (at least in the case of adults) disable the filter; and the library's policies concerning the use of its own computers do not prevent patrons from obtaining access to the Internet through computers located elsewhere.

The district court believed that closely monitoring patrons who use the Internet would be a less restrictive alternative than using filtering software. A public library, however, is not required to satisfy a court that it has used the least restrictive alternative. In any event, closely monitoring patrons who use the Internet would be *more* restrictive than using filtering software. It would deeply intrude on patron privacy, significantly change the experience for everyone who visits a public library, alter the relationship between librarians and patrons, and needlessly expose librarians to pornography many would prefer not to see.

E. The use of filtering software also satisfies strict scrutiny. Public libraries have a compelling interest in restricting access through their own computers to online obscenity, child pornography, and (in the case of minors) material that is harmful to minors. The use of filtering software is the least restrictive method to further that compelling interest.

II. There are no alternative grounds for affirming the district court's judgment. Appellees face a serious threshold barrier in making their claim that CIPA imposes an unconstitutional condition on their receipt of federal assistance. The courts of appeals that have addressed the issue have all concluded that governmental entities do not have First Amendment rights. Appellees seek to rely on the First Amendment rights of their patrons. But the unconstitutional conditions doctrine applies only to those upon whom purportedly unconstitutional conditions are actually imposed. CIPA does not impose any conditions on library patrons. Moreover, as explained in Point I, the use of

filtering software does not violate the First Amendment rights of patrons.

Assuming *arguendo* that public libraries may assert a First Amendment unconstitutional condition claim, there no merit to such a claim here. Congress may reasonably insist that those who receive federal assistance for Internet access and related services take the modest step of using filtering software to ensure that the assistance Congress has provided for educational and informational purposes does not facilitate access to illegal and harmful pornography. That condition does not distort the usual functioning of a public library. The material to which CIPA seeks to prevent access falls outside the collection boundaries of most public libraries, and many public libraries have determined that filtering software is the best way to prevent access to such material in a manner that is consistent with their missions. If a public library wishes to provide unfiltered access, it is free to decline federal assistance for Internet access and related services.

Nor is the use of filtering software a prior restraint on speech. Libraries that use filtering software do not regulate what speech may be placed on the Internet or prevent its dissemination throughout the world. They simply decline to obtain pornography from the Internet through their own computers and make it available to their patrons. That decision is no more a prior restraint on speech than a public library's decision to decline to subscribe to pornographic magazines. The judgment of the district court should therefore be reversed.

ARGUMENT

CIPA'S FILTERING PROVISIONS ARE FACIALLY CONSTITUTIONAL

I. CIPA DOES NOT INDUCE PUBLIC LIBRARIES TO VIOLATE ANY FIRST AMENDMENT RIGHTS OF THEIR PATRONS

This case involves the facial validity of an Act of Congress designed to ensure that federal assistance to libraries for Internet access and related services does not facilitate access to visual depictions that are obscene, child pornography, or harmful to minors. Under CIPA, a library may not receive federal assistance for Internet access and related services unless the library has a policy that includes the use of filtering software on Internet-connected computers that protects against access by all persons to visual depictions that are "obscene" or "child pornography," and that protects against access by minors to visual depictions that are "harmful to minors." 47 U.S.C. 254(h)(6)(B) and (C); 20 U.S.C. 9134(f)(1).

CIPA is not an exercise of Congress's regulatory authority over purely private conduct. Instead, it is an exercise of Congress's authority under the Spending Clause "to provide for the * * * the General Welfare of the United States," Article I, Section 8, Clause 1, by specifying the purposes for which federal assistance to libraries may be used. As such, CIPA's filtering conditions attach only when a library voluntarily chooses to accept federal assistance for Internet access and related services.

Because CIPA's filtering provisions are conditions on the receipt of federal assistance, and not regulatory restrictions, this Court's Spending Clause cases provide the appropriate framework for assessing CIPA's constitutionality. Under those cases, Congress has wide latitude to attach conditions

to the receipt of federal assistance in order to further broad policy objectives. *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). Congress's discretion to impose such conditions on state and local government entities, however, is subject to four limitations. First, the exercise of the spending power must be in pursuit of "the general welfare." *Id.* at 207. Second, Congress must condition the receipt of assistance "unambiguously." *Ibid.* Third, the condition must be related "to the federal interest in particular national projects or programs." *Ibid.* Fourth, Congress may not "induce" the recipient "to engage in activities that would themselves be unconstitutional." *Id.* at 210.

CIPA easily satisfies each of the first three limitations, and neither the district court nor appellees have suggested otherwise. J.S. App. 96a. Patrons seeking access to illegal and harmful online pornography in public libraries is a serious problem, and Congress's goal of ensuring that federal assistance to libraries does not facilitate such access is in "pursuit of the public welfare." The requirement that libraries receiving federal assistance use filtering technology that protects against access to such material is stated "unambiguously." 47 U.S.C. 254(h)(6)(B) and (C); 20 U.S.C. 9134(f)(1). And that requirement is also directly related to Congress's purpose in providing assistance to libraries for Internet access—to further the libraries' educational and informational missions. See 47 U.S.C. 254(h); 20 U.S.C. 9121, 9141(a)(1)(B); S. Rep. No. 226, *supra*, at 4.

Invoking *South Dakota* v. *Dole*'s fourth limitation, the district court held that the provisions of CIPA that apply to public libraries are facially unconstitutional because, in the court's view, a public library that uses filtering software in compliance with CIPA will necessarily violate the First Amendment rights of its patrons. The court reasoned that (1) a public library that connects its computers to the Internet creates a "designated public forum," (2) strict scrutiny

applies to content-based limitations on access to that "forum," and (3) the use of filtering software is not narrowly tailored to serve any compelling government interest.

That analysis is incorrect. A public library, like any library, has broad discretion to decide what information to make available to its patrons through its own computers, and the use of filtering software to protect against access to obscenity, child pornography, and material that is harmful to minors falls well within the permissible limits of that discretion.

A. Public Libraries Have Broad Discretion To Select The Material They Make Available To Their Patrons

1. To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons. For that reason, neither forum analysis nor strict scrutiny applies to a public library's collection decisions.

The first municipally-supported public library, the Boston Public Library, opened in 1854, and had as its mission "to promote equality of education opportunity, to advance scientific investigation, to save youth from the evils of an ill-spent leisure, and to promote the vocational advancement of the workers." J.A. 612 (GX 186 (Expert Report of Donald G. Davis, Jr. at 2)) (citation omitted). Over time, public libraries began to collect materials for recreational reading and other purposes as well. J.S. App. 33a. But facilitating learning and cultural enrichment have remained a focal point for most public libraries. Indeed, the American Library Association's current Bill of Rights provides that "[b]ooks and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves." *Id.* at 32a.

Consistent with their missions, public libraries seek to provide a wide array of information to the public. J.S. App.

33a. As the district court found, however, the goal of public libraries has never been to provide "universal coverage." *Id.* at 34a. Instead, public libraries seek to provide materials "that would be of the greatest direct benefit or interest to the community." *Id.* at 34a-35a. As the district court found, in doing so, public libraries seek to develop collections that have "*requisite and appropriate quality.*" *Id.* at 34a (emphasis added). Of necessity, public libraries therefore take into account the "*content of the material*" in making collection decisions. *Id.* at 35a (emphasis added). Some material may be selected for "artistic merit, scholarship, or value to humanity," while other material may be selected "to satisfy the informational, recreational and educational needs of the community." J.A. 586 (GX 114, at 3). In all cases, however, the content of the work is necessarily a factor in making a collection decision.

The need to make selective judgments stems in part from the economic reality that public libraries have finite budgets. J.S. App. 8a. But since the fundamental role of public libraries is to identify for their patrons material that has "requisite and appropriate quality," *id.* at 34a, public libraries would make selective judgments even if they had access to unlimited funds. See William A. Katz, *Collection Development: The Selection of Materials for Libraries* 6 (1980) ("[t]he librarian's responsibility * * * is to separate out the gold from the garbage, not to preserve everything"); Francis K.W. Drury, *Book Selection* xi (1930) ("It is the aim of the selector to give the public, not everything it wants, but the best of what it will read or use to advantage."); J.A. 636 (GX 187 (Rebuttal Expert Report of Donald G. Davis, Jr., at 3)) ("A hypothetical collection of everything that has been produced is not only of dubious value, but actually detrimental to users trying to find what they want to find and really need.").

That is certainly true with respect to pornographic material. Many public libraries include in their print collections sexually explicit materials that have significant value, such as "*The Joy of Sex*" and "*The Joy of Gay Sex.*" J.S. App. 33a. But very few public libraries collect graphic pornography, such as XXX-rated videos, or *Hustler* magazine. *Ibid.* The absence of pornographic books and videos from public libraries is not simply a function of finite budgets. Instead, it reflects a near universal consensus among public libraries that such materials are not appropriate for inclusion in their collections. J.A. 663-664 (GX 189 (Cronin Expert Report), at 6).

Thus, in fulfilling their traditional missions, public libraries necessarily make content-based collection decisions, including judgments concerning whether to collect pornographic material. Application of forum analysis and strict scrutiny would be incompatible with that tradition.

Indeed, subjecting collection decisions to forum analysis and strict scrutiny would risk transforming the role of public libraries in our society. Instead of vesting in public libraries responsibility for the resources that they collect and make available to their local communities, forum analysis would threaten to substitute judicial judgments regarding what is appropriate. A public library's traditional exercise of discretion to determine what materials to collect would be particularly threatened by application of strict scrutiny to collection decisions, which would require a library to establish that a challenged decision furthers a "compelling" interest, and that less restrictive alternatives would not be effective. *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 816 (2000). Libraries would often be hard-pressed to show that the selection of one resource rather than another always furthers a "compelling" government interest. Nor are libraries always likely to be in a position to demonstrate that there are no alternatives that

would be less restrictive, while still serving the library's overall collection goals. Libraries would also be vulnerable to charges that they have collected too many or too few works containing particular viewpoints. The very prospect of strict judicial review of collection decisions could chill libraries from exercising traditional editorial judgments.

2. This Court has not decided what level of scrutiny applies to a public library's content-based judgments regarding the material it makes available to its patrons. In two analogous contexts, however, the Court has made clear that the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public. In those contexts, neither forum analysis nor strict scrutiny applies.

In *Arkansas Educational Television Commission* v. *Forbes*, 523 U.S. 666, 672-673 (1998), the Court held that public forum principles do not generally apply to a public television station's editorial judgments regarding the private speech or other programming it presents to its viewers. The Court explained that "[b]road rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." *Id.* at 673. Recognizing a broad right of public access, the Court added, "would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion." *Id.* at 674.[4]

[4] *Forbes* held that "[a]lthough public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to that rule." 523 U.S. at 675. In that limited context, a public broadcasting station is treated as a nonpublic forum and therefore may not engage in viewpoint discrimination. *Id.* at 681-682. There is nothing comparable to candidate debates in the materials subject to CIPA, and there is no claim of viewpoint discrimination here.

Similarly, in *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998), the Court upheld an art funding program that required the National Endowment for the Arts (NEA) to use content-based criteria in the process of making funding decisions. The Court explained that "any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of art funding." *Id.* at 585. In particular, "[t]he very assumption of the NEA is that grants will be awarded according to the 'artistic worth of competing applicants,' and absolute neutrality is simply inconceivable." *Ibid.* (internal quotation marks omitted). The Court expressly rejected the application of forum analysis to art funding decisions, reasoning that such an analysis would conflict with "NEA's mandate * * * to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support." *Id.* at 586. See *Widmar* v. *Vincent*, 454 U.S. 263, 278 (1981) (Stevens, J., concurring in the judgment) (in order to safeguard the academic freedom of public universities, a public university's content-based decisions in allocating space for student programs should not routinely be subjected to forum analysis or strict scrutiny); *Board of Education* v. *Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) (public school has authority to remove books from a school library based on a determination that they are educationally unsuitable or pervasively vulgar); *id.* at 890-891 (Burger, C.J., dissenting) (public school's discretion to remove books from a school library is not constrained by the First Amendment).

The principles underlying *Forbes* and *Finley* also apply to a public library's exercise of judgment in selecting the material it makes available to its patrons. Just as forum analysis and heightened judicial scrutiny are incompatible with the discretion that public television stations must have to fulfill their journalistic responsibilities, and the discretion that the NEA must have to fulfill its responsibility to select worth-

while art, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions.

B. A Library's Broad Discretion To Make Collection Decisions Applies To Its Selection Of Material From The Internet

The district court acknowledged that libraries may select books for their collections on the basis of content without triggering forum analysis or strict scrutiny. Such collection decisions, the court concluded, are subject only to rational basis review. J.S. App. 120a. But the court refused to apply that same analysis to a public library's judgments regarding the material it makes available to its patrons through its Internet-connected computers. In the court's view, a public library that collects material from the Internet creates a "designated public forum," and strict scrutiny applies to content-based limitations on access to that "forum." For constitutional purposes, however, there is no relevant distinction between a library's collection of material from the Internet and its collection of books and other resources.

1. A public library does not make computers available to obtain material from the Internet in order to create a public forum for Web publishers to speak, any more than it collects books in order to provide a public forum for the authors of the books to speak. It provides Internet access for the very same reasons that it offers other library resources—to facilitate research, learning, and recreational pursuits through the furnishing of materials having requisite and appropriate quality. As Congress recognized, "[t]he Internet is simply another method for making information available in a school or library." S. Rep. No. 141, 106th Cong., 1st Sess. 7 (1999). In a very real sense, it is "no more than a technological extension of the book stack." *Ibid.*

Consistent with that understanding, public libraries exercise the same kind of judgments concerning the Internet that

they routinely apply to other media. For example, some libraries prohibit the use of their computers for the viewing of materials that are "offensive to the public," "objectionable," or "inappropriate." J.S. App. 37a. Other libraries prevent access to Web sites that contain graphic violence or tasteless material. GXs 71, 83, 99, 247. Other libraries do not allow patrons to use the libraries' computers to send and receive e-mail or to participate in chat rooms. J.S. App. 38a. Still other libraries forbid access to Web sites that include games or dating services. *Id.* at 37a-38a. And consistent with their practice with respect to books, magazines, and movies, many libraries prohibit their patrons from viewing online pornography. *Id.* at 37a. Those judgments are no less entitled to deference than the similar judgments that libraries make in deciding what books to collect.

As the district court itself recognized, a library's authority to collect material from the Internet cannot be distinguished from its authority to collect books on the ground that, once a library connects to the Internet, a library does not incur additional cost by offering additional material. J.S. App. 126a n.25. Many libraries do not have enough Internet-connected computers to meet patron demand. *Ibid.* In those circumstances, a library that allows its patrons to use its computers to send e-mail, play games, or view pornography necessarily denies other patrons the opportunity to use the computer for other purposes, such as research. See J.A. 663 (GX 189) (Cronin Expert Report), at 6) ("By permitting pornography to be viewed on their premises, public librarians are constraining those patrons interested in accessing educational and information resources."); see also J.S. App. 126a n.25 ("every time library patrons visit a Web site, they deny other patrons waiting to use the terminal access to other Web sites"). That circumstance requires public libraries to make judgments about what material they will make available through their Internet-connected computers.

Even if a library could always provide enough computers to meet patron demand, however, that would not change the analysis. Ultimately, a public library's need to exercise judgment in making collection decisions depends not on resource limitations, but on the traditional role that public libraries play in our society in identifying material that is suitable and worthwhile for their patrons. A library is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. Thus, if libraries have broad discretion to refrain from including pornographic magazines and XXX-rated movies in their collections, as they unquestionably do, they should also have broad discretion not to collect comparable material from the Internet.

2. The district court distinguished a library's collection of material from the Internet from its collection of books on a single ground. "The central difference," the court stated, "is that by providing patrons with even filtered Internet access, the library permits patrons to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers, without attempting to restrict patrons' access to speech that the library, in the exercise of its professional judgment, determines to be particularly valuable." J.S. App. 121a. In contrast, the court continued, "the content of every book that a library acquires has been reviewed by the library's collection development staff or someone to whom they have delegated the task, and has been judged to meet the criteria that form the basis for the library's collection development policy." *Id.* at 122a-123a.

That is not a tenable ground for subjecting a public library's book-collection decisions to rational basis review, while subjecting a public library's Internet collection decisions to strict scrutiny. A public library's decision to exclude dating services, games, e-mail, chatrooms, graphic violence, tasteless jokes, or pornography from its Internet

collection is clearly an exercise of a library's traditional discretion to exclude material that lacks the requisite and appropriate quality or that otherwise falls outside the library's mission. A public library's failure to make quality-based judgments about all the material it collects from the Web does not somehow taint the judgments it does make.

Moreover, because of the vast quantity of material on the Internet and its rapidly changing nature, libraries cannot possibly segregate, on an item-by-item basis, all the Internet material that is appropriate for inclusion in the library's collection from all the material that is not. While a public library could limit its Internet collection to just those sites it found worthwhile, it could do so only at the cost of excluding an enormous amount of valuable information that it lacks the capacity to review. Given that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude categories of content they regard as inappropriate for inclusion in a public library, without making individualized judgments that everything they do make available has requisite and appropriate quality. A public library's judgment that such an approach best serves its historic mission is entitled to substantial deference, not judicial suspicion.

Indeed, rather than promoting First Amendment values, the district court's analysis has the opposite effect. Under the district court's analysis, a public library that provides Internet access only to the limited number of sites its staff has had the time to review in advance would have broad discretion to make its selections. In contrast, a public library that provides access to a much wider range of material, but prevents access to certain material its staff has determined to be of low value or otherwise outside its mission, would have to justify its judgments under strict scrutiny. The district court's approach therefore creates a perverse incentive

for public libraries to make available *less* information in order to preserve their traditional discretion.

The district court's approach is particularly unpersuasive as applied to a public library's decision to exclude pornographic content. Most libraries already exclude pornography from their print collections because they regard it as inappropriate for inclusion in a public library. Under the district court's analysis, that judgment would be subjected to rational basis review, while a judgment to exclude online pornography from the library's Internet collection for precisely the same reason would be presumptively unconstitutional.

To the extent that the district court's analysis suggests a distinction between judgments of exclusion and judgments of inclusion, such a distinction is also untenable in this setting. "The job of the librarian is to know what to exclude as well as what to include." Will Manley, *The Manley Arts: Good Fences Make Good Libraries*, *Booklist* 446 (Nov. 1, 2001). For example, "[m]edical libraries don't need the definitive works of James Joyce. A corporate library does not need a complete section of animal-husbandry materials." *Ibid.* "Systematic weeding is an integral part of the selection process which helps maintain the quality of the Library's collection." J.A. 590 (GX 114, at 7). And, as noted above, most public libraries exclude pornography based on their judgment that it does not further their mission. As those examples illustrate, judgments of exclusion, like judgments of inclusion, play an important role in the development of a library's collection.

A public library's book collection authority also cannot be distinguished from its Internet collection authority on the ground that libraries rely on software companies to develop appropriate filtering programs. Libraries often rely on journal reviews and bibliographies to select their books, and they sometimes delegate to third party vendors the task of

supplying books that satisfy the libraries' collection standards. J.S. App. 35a. While libraries retain ultimate control over their book collections, they also retain ultimate control over their Internet collections. Public libraries select the software and blocking categories that best meet their needs, and can fine tune the software to add or delete specific sites from a blocking category. *Id.* at 52a.

C. The District Court's Application Of Strict Scrutiny Is Not Supported By Precedent

1. In applying strict scrutiny to a public library's Internet collection decisions, the district court relied on several of this Court's public forum and government subsidy cases. J.S. App. 127a-128a. But those cases resolved First Amendment issues far removed from the question presented here.[5]

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[5] See *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-831 (1995) (university that furnishes funds to groups to encourage a diversity of views from students may not refuse to fund speech that is otherwise within the parameters of the funding program solely on the basis of the viewpoint of the speaker); *City of Madison* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175-176 (1976) (school board required by law to hold public meetings where citizens participate may not "permit one side of a debatable public question to have a monopoly in expressing its views to the government"); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 552-555, 559-560 (1975) (municipal auditorium that is dedicated to discussion of public affairs by civic and other organizations may not deny a permit without following the established procedural safeguards that must accompany prior restraints on speech); *FCC* v. *League of Women Voters*, 468 U.S. 364, 381-382, 399-400 (1984) (prohibition against editorializing by broadcast stations that receive federal funds violates First Amendment because "the expression of editorial opinion lies at the heart of First Amendment protection," and because stations receiving federal assistance were not permitted to establish an "affiliate organization" that could then "editorialize with non-federal funds"); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 546 (2001) (funding restriction that prohibits attorneys from challenging welfare laws violates the First Amendment because it restricts speech based on the

None of those cases involved a public library. None of those cases involved a government institution or program designed to make available private works having requisite and appropriate quality. And none of those cases suggested that a public library's collection decisions should be subjected to strict scrutiny.

2. The district court also justified its application of strict scrutiny based on a separate line of authority holding that content-based limitations on access to a traditional public forum, such as a public sidewalk or park, are subject to strict scrutiny. J.S. App. 128a. See *Police Dep't of the City of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972). Internet access at public libraries, however, does not satisfy this Court's definition of a traditional public forum. A public library's Internet-connected computers—a resource that did not exist until the past decade or so—have not "immemorially been held in trust for the use of the public and, time out of mind, * * * been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions." *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 679 (1992).

Indeed, the district court acknowledged that the use of a public library's computers for Internet access does not satisfy the Court's test for a traditional public forum. J.S. App. 129a. The district court nonetheless viewed a public library's furnishing of material from the Internet as analogous to a traditional public forum, *id.* at 128a, because a public library itself is generally open to the public at no cost, *id.* at 129a-130a, and because the Internet permits speakers to reach a wide audience at a low cost, *id.* at 131a. That analysis is seriously flawed. This Court "has rejected the view that traditional public forum status extends beyond its

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anti-government viewpoint of the speaker and interferes with the proper functioning of the legal profession and the judiciary).

historic confines." *Forbes*, 523 U.S. at 678. The doctrines applicable to traditional public fora therefore may not be extended by analogy.

Even if they could, the district court's analogy is misconceived. Public sidewalks and parks are not public fora simply because the public may use them for free. Rather, they are public fora because private speakers, and not the government, have always determined the content of the speech that occurs there. In contrast, while public libraries have always been open to the public, they are open for particular purposes. They are not dedicated to the full range of uses available in a public park or on a public sidewalk, and they are not dedicated to general public discussion and debate, as any patron who has been told to stop talking by a librarian can attest. And, most significantly, public libraries have always determined the content of the works they collect and make available to their patrons. For similar reasons, the district court's analogy is not aided by the observation that speakers can reach a wide audience through the Internet. It is not the speakers' ability to reach a wide audience that makes a public sidewalk or park a traditional public forum, but the tradition of private speakers determining the content of the speech in such a forum.

Moreover, the district court's reliance on the nature of the Internet ignores the fundamental difference between the Internet itself and a public library's decision whether to allow the use of its own computers to retrieve various types of material from the Internet. The Internet itself is a forum for First Amendment activity, but it is not one that is government-owned. When a government places restrictions on the content that may be placed on the Internet, it acts as a regulator of private activity, and its restrictions are subject to strict scrutiny. *Reno* v. *ACLU*, 521 U.S. 844 (1997). In contrast, when a public library brings material from the Internet into the library through its own computers, it acts

as a collector of material for its patrons. It does not regulate the content of communication on the Internet, control its dissemination throughout the world, or affect access to that information through *other* computer terminals. In essence, a public library acts as a market participant, not as a market regulator, when it determines the extent to which it will obtain material from the Internet through its own computers in its own premises. Cf. *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In that capacity, a public library necessarily has both the responsibility and discretion to decide, within the broad limits traditionally accorded such institutions, how little or how much material to provide from the Internet.

D. Even If A Library's Connection Of Its Computers To The Internet Created A Forum, Strict Scrutiny Would Not Apply

1. Even if forum analysis applied to a public library's selection of material from the Internet, strict scrutiny would not apply to a library's use of filtering software to block material covered by CIPA. "The Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). As discussed above, a public library's Internet-connected computers are not traditional public fora. Accordingly, if forum analysis were applicable to a library's Internet-connected computers, they could only be either nonpublic fora or designated public fora. Of the two, they would more appropriately be viewed as nonpublic fora.

A designated public forum is created only when the government by "fiat" makes an affirmative choice to open up its property for use as a public forum. *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). "The government does not create a public forum by inaction or by

permitting limited discourse, but only by opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 788.

For the same reasons that a library's Internet collection is not subject to forum analysis at all, it also does not satisfy the definition of a designated public forum. As already discussed, public libraries do not connect to the Internet in order to open up a forum for web publishers to speak; instead, they do so to further the library's traditional mission of facilitating research, learning, and recreational reading or pursuits. Moreover, public libraries have always reserved the right to determine the content of their collections, including their Internet collections, and to exclude from their collections materials that do not have requisite and appropriate quality. That practice is inconsistent with an intent to create a designated public forum. *Cornelius*, 473 U.S. at 804 (limiting participation in Combined Federal Campaign to "appropriate" voluntary agencies is inconsistent with an intent to create a designated public forum).

Thus, if forum analysis were applicable, a public library's Internet collection should be treated as a nonpublic forum. Under this Court's decisions, the government may limit access to a nonpublic forum based on content "so long as the distinctions drawn are reasonable in light of the purposes served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806. The distinctions at issue are viewpoint neutral. CIPA provides for libraries to draw distinctions based on whether the material is "obscene," "child pornography," or "harmful to minors," not on the basis of any particular viewpoint on sexuality. Similarly, the commercial filtering products used by public libraries draw distinctions based on whether the material falls into a category such as "Pornography," J.S. App. 49a, not on the basis of any viewpoint about sexuality. The principle that the entity in charge of a nonpublic forum may not discriminate on the

basis of viewpoint is therefore not implicated here. See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 384-385 (1992) (prohibitions against obscenity and child pornography are based on content not viewpoint); *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 684-685 (1986) (prohibition against lewd and indecent speech is based on content, not viewpoint); *FCC* v. *Pacifica Found.*, 438 U.S. 726, 745-746 (1978) (plurality opinion) (restriction on patently offensive words dealing with sex is based on content, not viewpoint).

Because the use of filtering software involves distinctions based on content, rather than viewpoint, if a public library's Internet-connected computers were viewed as non-public fora, strict scrutiny would not apply. Instead, the relevant inquiry would be whether the use of the software is "reasonable in light of the purposes served by the forum." *Cornelius*, 473 U.S. at 806. Because a library's purpose in connecting to the Internet is to facilitate research, learning, and recreation of requisite and appropriate quality, the question would be whether the use of filtering software is reasonable in light of that purpose.

2. That same analysis would apply even if a public library's Internet-connected computers were treated as a designated public forum. In establishing a designated forum, the government is not required to create the equivalent of a traditional public forum that is presumptively available for expressive activities of all kinds, on all subjects, by all speakers. The government may instead create a "limited" public forum, and "confine" the forum "to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829. The constitutional standard applicable to a "limited" public forum is essentially the same as the constitutional standard applicable to a nonpublic forum. The government "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,'

* * * nor may it discriminate against speech on the basis of its viewpoint." *Ibid.*

If a library's Internet-connected computers were treated as a designated public forum, the designation would be for the limited purpose of facilitating appropriate research, learning, and recreational reading and other pursuits. As such, the relevant constitutional inquiry would not be whether the use of filtering software is narrowly tailored to further a compelling interest, but whether it is "reasonable" in light of those limited purposes. *Rosenberger*, 515 U.S. at 829-830.

E. The Use of Filtering Software Is A Reasonable Method To Exclude Pornography From A Public Library's Internet Collection

Regardless of whether a public library's collection of material from the Internet is subject to review for rationality or reasonableness, a library's use of filtering software to prevent access to material covered by CIPA is facially constitutional. The character of (and the reasonableness of any limitation on) any "forum" that results from installing computers and connecting them to the Internet must take account of the fact that the computers and the access to the Internet they afford thereby become part of the resources of a library. Because public libraries have traditionally not included pornographic materials in their collections, a public library's decision not to include pornography in the material it collects from the Internet constitutes a "reasonable" limitation on any nonpublic or limited public "forum" the library may be deemed to have created. And the use of filtering software is, in turn, a reasonable method to block access to pornographic material.

1. The district court recognized that pornographic material falls outside a public library's traditional collection boundaries. J.S. App. 33a. It also found that filtering soft-

ware is a reasonably effective way to screen out access to such material. *Id.* at 90a-91a. The district court nonetheless held that the use of filtering software is constitutionally deficient because all leading commercial filters block some constitutionally protected speech that does not fit into the categories identified by CIPA or the software categories that best capture CIPA material. *Id.* at 149a. For several reasons, the imperfection of filtering software does not affect the reasonableness of a library's judgment to use it.

First, a public library does not have an obligation to add material to its collection simply because the material is constitutionally protected. Public libraries do not include hundreds of thousands of constitutionally protected books, magazines, and videos in their collections. A library's decision not to provide certain constitutionally protected material through its Internet-connected computers raises no greater constitutional concern.

Second, a public library may reasonably decide that, in order to avoid making certain inappropriate material available to its patrons, it will also decline to make available certain material that may be worthwhile. For example, a public library may decide not to collect a particular magazine because of its pornographic pictures, even though that same magazine might contain worthwhile interviews with public figures. Relying on a similar judgment, a public library may decide to use filtering software that blocks material that is pornographic, even though it may also block some material that is non-pornographic.

Third, a library patron would only infrequently need to have access to a Web site that has been blocked in order to obtain the information he or she seeks. Based on the evidence submitted by appellees' own expert, filtering software erroneously blocks less than 1% of all Web sites. J.S. App. 79a, 85a (in sample of 500,000 sites, filtering software may have erroneously blocked "somewhere between 4,403 and

4,783 Web sites"). A recently released study confirms that blocking software has only a negligible impact on access to valuable information. Carolyn R. Richardson et al., *Does Pornography-Blocking Software Block Access to Health Information on the Internet*, 288 JAMA 2887 (2002). The study found that when a filter is set to the least restrictive setting, such as the "pornography" setting on one of the most widely used filters in public libraries (N2H2), it blocks 1.4% of all health sites. *Id.* at 2891-2892, 2899.[6] Any information that may be erroneously blocked can often be found on another Web site or on the library's bookshelves. For example, a witness who performed a search of the term "breast cancer" found that the first 50 sites were not blocked. 3/28/02 Tr. 97-98 (testimony of Tacoma librarian Biek). Similarly, as the district court found, many libraries carry books on human sexuality, such as *The Joy of Sex* and *The Joy of Gay Sex*. J.S. App. 33a.

Fourth, when patrons are unable to view a site because it has been blocked, the patron need only ask a librarian to unblock the site or (at least in the case of adults) disable the filter. As the district court found, libraries have the capacity to permanently unblock any erroneously blocked site. J.S. App. 52a. At least with respect to adults, CIPA also ex-

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[6] The above estimates are not inconsistent with the estimates cited by the district court that between 6% and 15% of the material blocked by filtering software is erroneously blocked. J.S. App. 149a. Those who made the 6%-15% estimates examined a sample of sites that were blocked, and determined the percentage of those sites that were erroneously blocked. Those who made the estimates in the text examined a sample of sites, without regard to whether they were blocked or unblocked, and determined the percentage of those sites that were erroneously blocked. The estimates in the text are more relevant in determining the effect of erroneous blocking on patrons, because patrons search for material throughout the entire universe of the web; they do not limit their searches to blocked sites.

pressly authorizes library officials to "disable" a filter altogether "to enable access for bona fide research or other lawful purposes." 20 U.S.C. 9134(f)(3) (disabling permitted for both adults and minors); 47 U.S.C. 254(h)(6)(D) (disabling permitted for adults).

The district court viewed unblocking and disabling as inadequate because some patrons may be too embarrassed to ask for assistance from a librarian. J.S. App. 172a. But library patrons are accustomed to asking for assistance from librarians—to locate material in the collection, to retrieve books in closed book stacks or on reserve, or to borrow materials from another library. Indeed, librarians answer more than seven million questions weekly. *Id.* at 33a-34a. There is no reason to anticipate that patrons will be any less willing to ask for assistance in obtaining information from the Internet. Moreover, the Constitution does not guarantee a patron the right to acquire information at a public library without any risk of embarrassment. Library patrons can be observed by librarians and other members of the public; patrons must ordinarily identify themselves in order to check out material or to obtain interlibrary loans; and libraries make a record of the material that patrons check out. Those standard operating procedures may deter some persons from using a public library to acquire information, but that does not mean that a library's standard operating procedures are unconstitutional.

In any event, a library has the ability to process anonymous unblocking requests. J.S. App. 173a. As the district court noted, such requests may not always be processed immediately. *Id.* at 174a. But that is also true when a patron requests material that is held in storage or in another branch, or that is available only by interlibrary loan. See PX 61, at CM00097 (Fort Vancouver) (interlibrary loan generally takes about three weeks); PX 66B, at 2 (Tulsa) (interlibrary loan generally takes 2-4 weeks). As these examples

illustrate, the First Amendment does not give a library patron the right to demand that a librarian provide requested information immediately.

2. The district court also identified what it believed to be less restrictive and equally effective ways to preclude library patrons from receiving access to illegal and harmful pornography on library computers. In particular, the court concluded that libraries could make clear to patrons that the library's Internet terminals may not be used to view illegal or harmful content, and that libraries can detect violations through direct observation or through logs that reveal all the sites that a patron selects. J.S. App. 158a-159a. The district court erred in imposing that approach. In deciding what information to collect from the Internet, a public library is not required to satisfy a court that is has pursued the least restrictive alternative. Even if a public library's connection of its computers to the Internet were regarded as creating a nonpublic or a limited public forum, it would have broad discretion to choose among reasonable alternatives in deciding how best to further its mission.

In any event, a system under which librarians closely monitor everyone using computers to make sure that they are not viewing pornographic material would be far more intrusive than the use of filtering software. Such a regime would deeply invade the privacy that patrons ordinarily experience when they peruse materials in a library. It would also significantly alter the experience of everyone visiting the library, including many who prefer to steer clear (and to have their children steer clear) of pornographic Web sites and are quite content to have the library help them do so.

The district court's proposed alternative would also risk transforming the role of a librarian from a professional to whom patrons turn for assistance in finding information into a compliance officer who many patrons might wish to avoid. Such a fundamental change in the relationship between pa-

trons and librarians would undermine rather than promote First Amendment values. Moreover, many librarians (like many patrons) would understandably be uncomfortable viewing pornographic depictions and confronting the patrons who are doing so. J.S. App. 44a. Under the court's alternative, those librarians would be needlessly exposed to material they would prefer not to see, and forced into a role they should not have to play.

The experience of the Greenville County Library System dramatically illustrates why a monitoring program is not a viable alternative to filtering software. In response to the problems associated with library patrons using its computers to view online pornography, Greenville instituted a policy prohibiting patrons from viewing online pornography, relocated all Internet-connected computers so that librarians would have visual contact with them, and entrusted librarians with responsibility to enforce its no-pornography policy. J.S. App. 40a. The result was that the library experienced a high turnover rate among librarians who worked in view of Internet terminals, while patrons continued to view online pornography. *Ibid.* Although the library considered discontinuing Internet access altogether, it ultimately adopted a filtering policy. *Ibid.*

The other alternatives discussed by the district court—moving terminals to places where their displays cannot easily be seen by other patrons, or purchasing privacy screens or recessed monitors (J.S. App. 165a-166a)—would not address a library's interest in preventing patrons from deliberately using the library's computers to view online pornography. To the contrary, by making it more difficult for library officials to monitor activity on the computers, those alternatives would make it easier for patrons to use the library's computers to obtain online pornography.

Even as methods for preventing inadvertent exposure to pornographic material, the additional alternatives discussed

by the district are less effective than filtering software. Placing computers outside of patron sight-lines is constrained by libraries' space limitations and physical layouts. J.S. App. 42a. Privacy screens do not always prevent inadvertent viewing by patrons or librarians who pass by; they make it difficult for patrons to work together at a single terminal; they may be removed by patrons in order to improve the view; and they impose additional costs. *Id.* at 43a, 166a. Recessed monitors pose similar problems. *Ibid.* In contrast, filtering software efficiently addresses the problems associated with both deliberate and inadvertent exposure to online pornography.

F. The Use of Filtering Software Satisfies Strict Scrutiny

Even if strict scrutiny were applicable to a public library's collection of material from the Internet, a public library's use of filtering software to screen out material covered by CIPA would be constitutional. A government program satisfies strict scrutiny when it advances governmental interests that are "compelling" and employs "the least restrictive means" to further those interests. *Playboy Entertainment Group, Inc.*, 529 U.S. at 816. That standard is satisfied here.

The government has a compelling interest in preventing the dissemination of obscenity, *Miller* v. *California*, 413 U.S. 15, 18 (1973), child pornography, *New York* v. *Ferber*, 458 U.S. 747, 757 (1982), and, in the case of minors, material that is harmful to minors, *Ginsberg* v. *New York*, 390 U.S. 629, 637 (1968). In the unique setting of a public library, the government also has a compelling interest in protecting library patrons, including minors, from inadvertent exposure to pornographic visual depictions. Cf. *FCC* v. *Pacifica*, 438 U.S. 726, 748-749 (1978) (plurality opinion); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974) (plurality opinion). The use of filtering software is the least restrictive method to further those interests. For the reasons discussed

above, the alternatives identified by the court are either more restrictive or not as effective as filtering software in serving the government's compelling interests.

II. APPELLEES' OTHER CHALLENGES DO NOT PROVIDE AN ALTERNATIVE GROUND FOR AFFIRMANCE

Appellees argue that the district court's judgment may be affirmed on the alternative grounds that CIPA imposes an unconstitutional condition on the receipt of federal assistance, and that a library's use of filtering software constitutes an impermissible prior restraint on speech. ALA Mot. to Aff. 22-26; Multnomah County Resp. 17-19. Those contentions are without merit.

A. CIPA Does Not Impose An Unconstitutional Condition On The Receipt of Federal Assistance

1. Under the doctrine of unconstitutional conditions, "the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech' even if he has no entitlement to that benefit." *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)). Appellees face a threshold barrier to relying on that doctrine. Public libraries that receive federal assistance for Internet access are government entities, and the courts of appeals that have addressed the issue have concluded that government entities do not have First Amendment rights. *Warner Cable Communications, Inc.* v. *City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990), cert. denied, 501 U.S. 1222 (1991); *NAACP* v. *Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990); *Student Gov't Ass'n* v. *Board of Trs. of the Univ. of Mass.*, 868 F.2d 473, 481 (1st Cir. 1989); *Estiverne* v. *Louisiana State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989); *Muir* v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1038

(5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983). See *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* government interference; it confers no analogous protection *on* the government."); *id.* at 139 n.7 ("The purpose of the First Amendment is to protect private expression.") (quoting Thomas I. Emerson, *The System of Freedom of Expression* 700 (1970)).

Furthermore, if a government entity, such as a public library, does have First Amendment rights, it would be difficult to understand how appellees could defend the district court's holding that CIPA induces public libraries to violate the First Amendment rights of their patrons. If public libraries have a First Amendment right to determine what material to add to their Internet collections, they surely would have a First Amendment right to use filtering software notwithstanding the objections of certain library patrons and web publishers.

Perhaps for those reasons, appellees ultimately do not rely on the First Amendment rights of public libraries in making their unconstitutional conditions claim. Instead, they contend (ALA Mot. to Aff. 23-24) that CIPA imposes an unconstitutional condition on the First Amendment rights of library patrons. But library patrons are not the recipients of the federal assistance, and CIPA therefore does not impose any conditions at all on them. It follows that CIPA does not impose any *unconstitutional* condition on library patrons. As this Court explained in *Rust* v. Sullivan, 500 U.S. 173 (1991), the Court's "'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy, * * * effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally [assisted] program." 500 U.S. at 197 (emphasis omitted). The unconstitutional conditions doctrine

does not apply to non-recipients upon whom no conditions have been imposed.

Moreover, as explained in Point I, a public library's use of filtering software does not violate any First Amendment rights of library patrons. For this reason as well, CIPA's requirement that a library use filtering software as a condition on the receipt of federal assistance for Internet access and related services would not amount to an unconstitutional condition, even if the effect on library patrons were appropriate to consider in the unconstitutional conditions analysis.

2. Assuming *arguendo* that public libraries may assert a First Amendment unconstitutional conditions claim, that claim would lack merit. Within broad limits, "when the Government appropriates public funds to establish a program, it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. The E-rate and LSTA programs were intended to make federal assistance for Internet access and related services available to public libraries to further their traditional role of obtaining requisite and appropriate material for educational and informational purposes. Especially since public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably conclude that a parallel limitation is appropriate under its program to assist libraries in expanding their collection activities to include the Internet.

Furthermore, in general, a condition of federal assistance violates the unconstitutional conditions doctrine only when it "prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally [assisted] program." 500 U.S. at 197 (emphasis omitted). CIPA does not exceed that limitation. A recipient that wishes to offer unfiltered access outside the scope of the federal program may do so—for example, at an affiliated library that does not receive federal assistance for Internet access. ALA errs in contending (ALA Mot. to Aff. 25-26) that CIPA exceeds the

limits of Congress's authority because it applies to all computers at a library facility that receives federal assistance for Internet access and related services, including computers paid for by non-federal funds. Under *Rust*, Congress is entitled to "require a certain degree of separation" from the E-rate and LSTA programs "in order to ensure the integrity" of those programs. 505 U.S. at 198. Permitting public libraries to offer unfiltered access at the very facilities that receive federal assistance for Internet access or related services would undermine the integrity of those federal programs.

Appellees similarly err in contending, in reliance on *Legal Services Corp.*, that CIPA's filtering conditions "distort the usual functioning of public libraries." ALA Mot. to Aff. 24 (quoting *Legal Services Corp.*, 531 U.S. at 543). In *Legal Services Corp.*, the Court concluded that the government program of furnishing legal aid to the indigent differed from the program in *Rust* "in the vital respect" that the role of lawyers supported by federal funds who represent clients in welfare disputes is to advocate *against* the government, and there was thus an assumption that counsel would be free of state control. 531 U.S. at 542-543. The Court concluded that the government-imposed restriction on advocacy in such welfare disputes would distort the usual functioning of the legal profession and the federal and state courts before which the legal aid lawyers appeared. Public libraries, by contrast, have no comparable role that pits them against the government, and there is no comparable assumption that public libraries must be free of any conditions that their benefactors, public or private, might attach to the use of funds or other assistance they donate to facilitate the acquisition of library resources.

Furthermore, the Court indicated in *Legal Services Corp.* that a condition on federal assistance "distorts the usual functioning" of a program in a way that raises First Amend-

ment concerns only when its effect is to suppress speech that is "inherent in the nature of the medium." 531 U.S. at 543. Providing patrons with illegal or harmful pornography is not "inherent" in the role of public libraries in our society. To the contrary, libraries have traditionally excluded such material from their collections. Similarly, providing unfiltered access to the Internet is not "inherent" in the role of public libraries. Libraries have never had as their goal "universal coverage," J.S. App. 34a, and many libraries have found the use of filtering software to be the best way to make material available from the Internet in conformity with their traditional missions. Library Research Center, Univ. of Ill. Grad. Sch. of Lib. & Info. Sci., *Survey of Internet Access Management in Public Libraries* (June 2000) (PX 38); J.S. App. 3a. To the extent that other libraries have reached a different conclusion, they are free to decline federal assistance.

Appellees assert (ALA Mot. to Aff. 24-25) that CIPA distorts the usual functioning of a public library because some libraries have chosen not to use filtering software. As *Rust* makes clear, however, speech-related conditions do not fall outside Congress's authority to define the limits of a federal program simply because a recipient objects to the policy judgment underlying them. In *Rust*, recipients of family planning funds challenged a restriction on abortion counseling on the ground that it interfered with their own judgments that appropriate family planning counseling includes abortion counseling. The Court rejected that claim, holding that Congress has authority to insist "that public funds be spent for the purposes for which they were authorized." 500 U.S. at 196. The Court further explained that "the recipient is in no way compelled to operate a [federal] project; it can simply decline the subsidy." *Id.* at 199 n.5. That analysis is controlling here.

B. A Library That Uses Filtering Software Does Not Impose A Prior Restraint On Speech

Appellees' reliance (ALA Mot. to Aff. 22-23; Multnomah County Resp. 17-19) on the presumption against prior restraints is also misplaced. A library's use of filtering software does not impose a "restraint" on Internet content. Any material blocked by a filter remains on the Internet and may be obtained from millions of computers throughout the world. A library's decision not to provide such material through its own computers is a collection decision, not a restraint on private speech.

Acceptance of appellees' contrary view would lead to the conclusion that a librarian observing a patron viewing hardcore obscenity through the library's computers would have to permit the patron to continue to do so unless and until the library could persuade a court that the material is obscene. See *Conrad*, 420 U.S. at 552-555, 559-560. The same would be true even if the patron were a 12-year old. Appellees' theory would also lead to the conclusion that public libraries engage in prior restraints when they fail to provide pornographic magazines or XXX-rated videos to their patrons. As those examples illustrate, prior restraint doctrine has no application to a public library's collection decisions.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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